No. 96-510

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In the Supreme Court

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United States

October Term, 1996

WILLIAM BLAND AND NATIONAL ASSOCIATION OF TELECOMPUTER OPERATORS,

Petitioners,

VS.

DANIEL WM. FESSLER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

JOINT BRIEF FOR RESPONDENTS IN OPPOSITION

DANIEL E. LUNGREN,
Attorney General of the State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney General
RONALD A. REITER,
Deputy Attorney General

300 South Spring Street
Suite 5212
Los Angeles, CA 90013
Telephone: (213) 897-2628

Attorneys for Respondent Daniel E. Lungren

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN
Counsel of Record

Public Utilities Commission
of the State of California
505 Van Ness Avenue
San Francisco, CA 94102
Telephone: (415) 703-1992

Attorneys for Respondents Daniel Wm. Fessler, P. Gregory Conlon, Norman D. Shumway, Jessie J. Knight, Jr., and Patricia M. Eckert

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QUESTIONS PRESENTED

1. Whether the Ninth Circuit correctly concluded that the live operator requirement of Cal. Pub. Util. Code §2874 – California's statutory requirement that for unsolicited telephone calls initiated by automatic dialing devices, the caller may not play a prerecorded message unless a live operator first identifies the caller and obtains the call recipient's consent to hear the message – is a constitutionally permissible time, place or manner restriction on protected speech.

2. Whether petitioners' challenge to the separate live operator requirement of Cal. Civil Code §1770(v) presents a justiciable Article III case or controversy, where no party has ever enforced or threatened to enforce that provision against petitioners.

3. Assuming petitioners' challenge to §1770(v) presents a justiciable case or controversy, whether the Ninth Circuit correctly concluded that the live operator requirement of §1770(v) is a constitutionally permissible time, place or manner restriction on protected speech or a constitutionally permissible regulation of commercial speech.

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INTRODUCTION

Petitioners seek review of the Ninth Circuit's rejection of their First Amendment challenge to two California statutes governing the use of "automatic dialing and announcing devices" ("ADADs"). *Bland v. Fessler,* 88 F.3d 729 (9th Cir. 1996); Pet. App. 1a-24a. ADADs are electronic devices that can be programmed to dial random or sequential sets of telephone numbers and, without the consent of the called party, play a prerecorded message that often cannot be disconnected from the called party's telephone line.[1] These devices have the prodigious capacity to dial millions of telephone numbers: less than 200 ADADs can call every home in the United States once a week.[2]

California Public Utilities Code §2874 ("§2874") prevents ADAD users from playing uninvited prerecorded telephone messages unless the message is preceded by a live person who identifies the caller, obtains the called party's consent to hear to the message, and disconnects the ADAD from the telephone line when either party hangs up. Pet. App. 3b-4b.

California Civil Code §1770 is part of the state's Consumer Legal Remedies Act. The Act is an economic and consumer protection provision that defines more than 20

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[1] There are at least two types of automatic dialing devices that fall within the statutory definition of ADAD contained in Cal. Pub. Util. Code §2871 – one that dials a telephone number and then automatically plays a prerecorded message when the call is answered, and one that allows a live person to pick up the line after the call is answered, to converse with the called party and then, presumably with the called party's consent, to play the prerecorded message. C.A. App. 3, 69. The use of the latter type of ADAD complies with California law and is not at issue in this case.

[2] *State by Humphrey v. Casino Marketing,* 491 N.W.2d 882, 888 n. 4 (Minn. 1992), *cert. denied,* 507 U.S. 1006 (1993).

different types of unfair methods of competition and unfair acts or practices, one of which is the use of unsolicited prerecorded statements to sell or lease goods or services to consumers. Cal. Civ. Code §1770(v) ("§1770(v)"); Pet. App. 1c. An unsolicited prerecorded message may be played only if the call is introduced by a real person who discloses the identity and address or telephone number of the caller and obtains the consent of the called party to hear the automated message. *Id.*

The Ninth Circuit upheld §2874 as a time, place, or manner restriction and sustained §1770(v) under the *Central Hudson*[3] test for permissible commercial speech regulation. Petitioners do not assail the application of the time, place, or manner doctrine[4] or the method of applying the *Central Hudson* test. Rather, they attempt to entice the Court to use this case as a vehicle to reexamine points supposedly "left open" in the *Discovery Network*[5] and *44 Liquormart*[6] opinions. This case, however, does not provide the proper legal context for revisiting those cases. Moreover, the Ninth Circuit's opinion is correct and perfectly consistent with all apposite appellate authority, and does not call for review by this Court.

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[3] *Central Hudson Gas & Elec. Corp. v. Pub. Serv. Comm'n*, 447 U.S. 557 (1980).

[4] In applying the time, place or manner standard, the Ninth Circuit closely followed the test and principles articulated in *Ward v. Rock Against Racism*, 491 U.S. 781, 791 (1989), and *Kovacs v. Cooper*, 336 U.S. 77 (1949). The Ninth Circuit indicated that §1770(v), like §2874, is sustainable as a permissible time, place or manner restriction. Pet. App. 22a.

[5] *Cincinnati v. Discovery Network, Inc.*, 507 U.S. 410 (1993).

[6] *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996).

I. THIS CASE IS CONSISTENT WITH *ALL* APPELLATE AUTHORITY

All federal appellate and state supreme courts that have considered First Amendment challenges to ADAD statutes similar to California's have rejected the challenges. *Van Bergen v. Minnesota,* 59 F.3d 1541 (8th Cir. 1995); *Moser v. FCC,* 46 F.3d 970 (9th Cir.), *cert. denied,* 115 S.Ct. 2615 (1995); *State by Humphrey v. Casino Marketing,* 491 N.W.2d 882 (Minn. 1992), *cert. denied,* 507 U.S. 1006 (1993); *see also Destination Ventures, Ltd. v. FCC,* 46 F.3d 54 (9th Cir. 1995) (upholding statute prohibiting unsolicited commercial fax messages).

The cases cited by petitioners do not involve a conflict justifying the grant of certiorari. *Moser v. Frohnmayer,* 315 Or. 372, 845 P.2d 1284 (1993), was decided on state – not federal – constitutional grounds and thus presents no conflict. Similarly, *Lysaght v. New Jersey,* 837 F.Supp. 646 (D.N.J. 1993), is a discredited district court case relying on the dissenting opinion in *Casino Marketing* and on the district court opinion in *Moser v. FCC,* 826 F.Supp. 360 (D.Or. 1993), which was reversed by the Ninth Circuit in *Moser,* 46 F.3d 970. There is simply no decisional conflict warranting this Court's review.

II. THIS CASE DOES NOT ILLUMINATE ANY ISSUE ARGUABLY LEFT OPEN BY FOOTNOTE 11 IN *CINCINNATI v. DISCOVERY NETWORK*

Petitioners contend that *Discovery Network's* footnote 11[7] "left open" the possibility that core First Amendment

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[7] 507 U.S. at 416 n. 11.

scrutiny, rather than more lenient commercial speech standards, should be applied to regulations of commercial speech that have objectives unrelated to commercial harms flowing from that speech. Even if footnote 11 presents this question, the question is not one to be answered in the case at bench.

Unlike the regulation in *Discovery Network*, §1770(v) is aimed directly at the commercial harms emanating from the method used to disseminate commercial messages. California has a substantial governmental interest in fostering fair trade practices[8] and has chosen to do so, in part, by preventing a chaotic competitive scramble for consumer sales at the sacrifice of privacy.[9]

ADADs have the unique and staggering ability to penetrate the sanctity of residential privacy and intrude on efficient business operations.[10] Petitioner Bland's two ADADs, for example, are capable of dialing nearly three quarters of a million, perhaps more, unsolicited calls per year.[11] Congress

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[8] *Cf. California v. Arc America Corp.*, 490 U.S. 93, 101 (1989).

[9] The protection of privacy is, of course, a substantial interest justifying regulation of both commercial and noncommercial speech. *See Frisby v. Schultz*, 487 U.S. 47, 484-85 (1988); *Florida Bar v. Went For It, Inc.*, 115 S. Ct. 2371, 2376 (1995). Californians in large numbers shield their privacy from being pierced by telephone contact: approximately 50% of the population (7 million households and 16 million people) pay monthly charges to have unlisted telephone numbers, and 11 of the 12 metropolitan areas having the highest proportion of unlisted numbers in the United States are located in California. C.A. App. 236-37, 244-45.

[10] *Van Bergen*, 59 F.3d at 1554-55; *Moser*, 46 F.3d at 972.

[11] Bland operates his two ADADs 12 hours a day, every day, and each machine has the capability of placing 1,000 calls per day, or a remarkable 730,000 calls per year. C.A. App. 319, 818; *see also* S. Rep. No. 102-178, 102d Cong., 2d Sess. (1991), *reprinted in* U.S. Code Cong. & Admin. News 1968, 1970. If, however, each call lasted 15 seconds on average (many calls will be terminated before the entire message is

found that by 1991, more than 180,000 solicitors were using automated machines to telephone 7 million people each day.[12] Although fewer than 200 ADADs can call every home in the United States once a week,[13] more than 10,000 ADADs have been sold with the capacity of generating an astonishing 10 million calls a day.[14] Indeed, ADAD calls are "flourishing, and becoming a recurring nuisance by virtue of their quantity." *Van Bergen*, 59 F.3d at 1555. The California Legislature attempted to prevent the commercial harm directly flowing from this annoying, perniciously intrusive method of competition for consumer sales:

> Unsolicited pre-recorded calls are a source of great aggravation to many people, interrupting their affairs and tying up their lines. It is believed that consumers should have a right to know who is calling at the outset, and to reject a pre-recorded message before it begins.

Calif. Sen. Judiciary Comm. Rept. On Assembly Bill 408 enacting §1770(v).

Discovery Network's footnote 11 at most questions whether a law may distinguish between commercial and non-commercial speech when the objectives of the law are unrelated to any distinction between the two types of speech. The

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delivered), Bland's two machines alone could make 2.1 million calls per year.

[12] *Moser*, 46 F.3d at 972.

[13] *Casino Marketing*, 491 N.W.2d at 888 n. 4.

[14] C.A. App. 242, 818-819, 848-852. Moreover, while petitioners assert that unlike the many existing and fully operational "older" machines, newer ADADs do not have disconnection problems, Pet. 6, the record shows that Bland's "state-of-the-art" ADADs could not be disconnected from the telephone line of a complaining party on at least two separate occasions. C.A. App. 119, 376, 754-57.

distinction recognized in §1770(v), in contrast, is directly related to the harms created by the use of ADADs in mass market sales campaigns. Accordingly, this case does not present a context in which the purported footnote 11 question can be resolved.

III. THIS CASE DOES NOT INVOLVE THE FIRST AMENDMENT ISSUES DISCUSSED IN *44 LIQUORMART*

This case is a wholly inappropriate medium to elucidate or resolve issues discussed in *44 Liquormart, Inc. v. Rhode Island*, 116 S.Ct. 1495 (1996). *Liquormart* involved a complete, categorical ban on truthful, nonmisleading liquor price advertising to promote temperance objectives rather than correct any commercial harm. The opinions of the Justices varied only on whether and to what extent the *Central Hudson* commercial speech test should be applied to such a categorical ban.

In marked contrast, §1770(v) neither bans nor even regulates the content of any commercial message. Section 1770(v) merely places some restrictions on the manner in which uninvited, prerecorded solicitations may be delivered. The statute allows the use of prerecorded messages as long as a live operator identifies the name and telephone number or address of the caller and secures the consent of the called party to hear the recording.[15] The statute leaves completely unfettered all other forms of consumer solicitations, including live voice telephone calls, door-to-door solicitations, Internet and other electronic communication, leaflets, and newspaper and broadcast advertisements. The case thus does not implicate any of the issues with which the Court grappled in *Liquormart* and does not provide the context for the reexamination of the *Central Hudson* test.

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[15] Nor do the California statutes ban ADADs. *See* Note 1, *supra*.

IV. THIS CASE IS CONSISTENT WITH *MARTIN V. STRUTHERS*

Petitioners' contention that the Ninth Circuit's opinion clashes with *Martin v. Struthers*, 319 U.S. 141 (1943), is predicated on a false analogy between California's limited regulation of prerecorded solicitations and the total ban on door-to-door solicitations denounced by this Court in *Martin*. The outright ban on solicitations interfered with the right of homeowners to decide for themselves whether to receive door-to-door messages; this Court found that homeowners had the right to post their own signs if they wished to ward off unwanted person-to-person sales pitches. *Id.*, at 142, 143-44, 148-49.

The Ninth Circuit correctly noted that the qualitative difference between the onslaught of automated calls and the visit of door-to-door solicitors makes *Martin* inapposite. As the Ninth Circuit observed, the sheer magnitude of ADAD calls and the inability of a called party to interact with a live person and to request not to be called again, make the character of the automated call far different from the live door-to-door solicitation. Pet. App. 8a.[16]

Moreover, the statute found offensive in *Martin* prohibited solicitations whether or not the homeowner wished to receive them. The California statutes, in contrast, permit the

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[16] "When the call is made by a live operator . . . , the recipient has the opportunity to tell the operator, at any point in the conversation, that he does not want to hear from the calling person or entity again. An ADAD does not offer the recipient the option of cutting off the calls; it does not offer householders a choice of whether to respond to the speaker or not. The ADAD recipient may hang up as soon as the message starts, but has no opportunity to tell the machine that he does not want it to call again, and may be obliged, against his will, to respond over and over to the same unwanted caller." *Van Bergen*, 59 F.3d at 1555.

called party to determine on a call-by-call basis which automated messages to receive and which to reject. Thus, §2874 and §1770(v) defend both the principle of individual choice expressed in *Martin* and the privacy of individuals from the encroachment of an otherwise assaultive technology.

Petitioners contend that the live operator requirement is unconstitutional because other alternatives are available to repel unwanted calls. Petitioners advocate the use of "do not call lists" on which telephone subscribers could register their desire not to be called. No evidence was presented that a general list is feasible, and telephone subscribers seeking privacy would have to register themselves (and often their *unlisted* telephone numbers) on an endless number of lists maintained by different businesses. More significantly, a "do not call list" presents consumers with an all-or-nothing choice. The live operator requirement, on the other hand, serves the principle of *Martin* by permitting the called party to learn the identity of each caller and then decide on a call-by-call basis which prerecorded messages to hear.[17]

V. REVIEW OF THIS CASE WILL NECESSARILY INVOLVE AN EXAMINATION OF PETITIONERS' LACK OF STANDING TO CHALLENGE §1770(v)

The California Attorney General has no civil or criminal remedies under §1770(v) against petitioners or anyone else. Nonetheless, petitioners filed this challenge to §1770(v) as a

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[17] Petitioners presented even more unacceptable alternatives to the courts below (*e.g.*, turning off the telephone bell to avoid all calls), which apparently have now been abandoned. Petitioners now, for the first time, refer to a "tone device," the existence, cost, and availability of which are unknown; this Court is not the appropriate forum in which to take new evidence.

civil rights action (42 U.S.C. §1983) against the Attorney General and seek attorney's fees under 42 U.S.C. §1988. Although the Attorney General is legally incapable of directly enforcing the statute, petitioners argued to the courts below, as a purely abstract proposition, that the Attorney General could redress violations of §1770(v) under California's general unfair trade practice statute, Cal. Bus. & Prof. Code §17200, *et seq.* That provision authorizes actions for injunctive relief and civil penalties (not fines as alleged in the petition) to combat unlawful business conduct. The Attorney General, however, *never* enforced, attempted to enforce, or threatened to enforce §1770(v) indirectly against the petitioners or anyone else at any time under any theory of law, including the unfair trade practice statute. C.A. App. 90.

This Court has repeatedly held that "at an irreducible minimum, Art. III requires the party who invokes the court's authority to 'show that he personally has suffered some actual or threatened injury as the result of the putatively illegal conduct of the defendant.' " *Valley Forge Christian College v. Americans United,* 454 U.S. 464, 472 (1982). Finding no standing, the Ninth Circuit originally agreed that "there is simply no 'genuine threat' that the civil statute is 'about to be enforced' [citation] by the Attorney General against Bland or any other member of NATO." April 1, 1996 slip. op., at 3932. This opinion was inexplicably superseded by the final opinion erroneously finding the presence of standing. If this Court grants the petition, the Attorney General will focus on the absence of a case or controversy sufficient to satisfy the threshold jurisdictional requirements of Art. III, §2, of the Constitution.[18]

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[18] Petitioners' failure to satisfy the threshold elements of an action under 42 U.S.C. §1983 will also be at issue. *See Comes v. Toledo,* 446 U.S. 635, 640 (1980).

CONCLUSION

The United States has indeed become idyllic if this case presents one of the paramount constitutional issues to be confronted by the Court this Term. The Ninth Circuit applied well-established time, place, or manner rules and commercial speech doctrine to reject the challenge to reasonable state regulation of uninvited automated telephone calling. In so doing, the Ninth Circuit followed the Eighth Circuit and the Minnesota Supreme Court and acted in harmony with opinions of this Court. This case does not present a vehicle for the examination of unresolved First Amendment issues or the reexamination of well-settled principles. Accordingly, the petition for a writ of certiorari should be denied.

Respectfully submitted,

DANIEL E. LUNGREN,
Attorney General of the
State of California
HERSCHEL T. ELKINS,
Senior Assistant Attorney
General
RONALD A. REITER,
Deputy Attorney General

300 South Spring Street
Suite 5212
Los Angeles, CA 90013
Telephone: (213) 897-2628

Attorneys for Respondent
Daniel E. Lungren

PETER ARTH, JR.
EDWARD W. O'NEILL
MARK FOGELMAN
Counsel of Record

Public Utilities Commission
of the State of California
505 Van Ness Avenue
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